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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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8 DERRICK SATCHELL et al., No. C 03-02659 SI
9 Plaintiffs, Related Case No. C 03-2878 SI
10 v.
11 FEDEX EXPRESS,
12 Defendant.

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15 **ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTIONS TO COMPEL; GRANTING
PLAINTIFFS' MOTION FOR
SANCTIONS**

16 This order resolves a number of discovery disputes between the parties.¹ As set forth below, the
17 Court GRANTS in part and DENIES in part plaintiffs' motions to compel, and GRANTS plaintiffs'
18 motion for sanctions.

19 **1. Plaintiffs' Interrogatory No. 4, Second Set (Docket Nos. 450, 477)**

20 The parties dispute whether defendant has sufficiently answered Interrogatory No. 4, which
21 states,

22 For each of the job codes in the Minority Employee Class and the African-American
23 Lower-Level Manager Class, please identify the following by job code and job title:

- 24 a. Each performance review used to evaluate employees in that job code from
25 January 1, 1997, to the present, including, for each performance review and for
26 each time period, a list of the categories and subcategories evaluated, the weights
assigned to each category and subcategory, the guidelines provided to managers
for evaluating each category and subcategory, and the rating scale provided to
managers for evaluating each category and subcategory; and
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28 ¹ The letter briefs are found at Docket Nos. 448-450, 453-456, 458, 466, 477-482, 486-488, 490,
and 494-479 in C 03-3659 SI, and at Docket Nos. 133, 135-136, 142, 147, 151 and 152 in C 03-2878.

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- 1 b. The Bates number of each performance review form and/or OLPR screen
2 printout produced to Plaintiffs corresponding to each of the performance reviews
3 identified in response to (a).

4 Docket No. 450, Ex. A.

5 Plaintiffs contend that FedEx's response to this interrogatory is insufficient because FedEx only
6 addressed online performance review forms, not paper performance review forms.² Defendant contends
7 that it has fully answered the interrogatory, and that plaintiffs are attempting to obtain information
8 through the motion to compel that they did not actually ask for in the interrogatory.

9 The Court finds that by only providing information about online performance review forms,
10 FedEx did not fully answer Interrogatory No. 4. That Interrogatory asks for information regarding
11 "each performance review" used to evaluate employees in a variety of different jobs; "each" means
12 every type of performance review, whether online or paper. Defendant is correct that the interrogatory
13 does not ask FedEx to specifically state when each paper performance review was used, or whether there
14 was a time period during which managers could use both online or paper performance reviews.
15 However, the interrogatory does ask, with respect to "each" performance review used, for "a list of the
16 categories and subcategories evaluated, the weights assigned to each category and subcategory, the
17 guidelines provided to managers for evaluating each category and subcategory, and the rating scale
18 provided to managers for evaluating each category and subcategory." FedEx is ordered to supplement
19 its interrogatory response to include this information with regard to any and all paper performance
20 reviews used between January 1, 1997 to the present. To the extent that any of this information differs
21 depending on the time period – for example, if different paper review forms were used at different times
22 for the same jobs, or if the weights assigned to each category and subcategory changed over time – the
23 interrogatory response must contain this information.

24 Plaintiffs also contend that FedEx's interrogatory response is insufficient because FedEx did not
25 specifically identify the Bates number of each performance review form that corresponds with the
26 performance reviews identified in subsection (a) of the interrogatory. FedEx does not specifically

27 ² According to FedEx's September 18, 2006 letter, FedEx agreed to produce copies of all paper
28 performance review forms used by FedEx during the time period covered by the interrogatory.

1 address this issue in its letter brief; instead, FedEx generally asserts that Rule 33(d) allows for the use
2 of business records when the answer to an interrogatory may be derived or ascertained. Here, plaintiffs
3 assert that it is not evident from the face of the documents which forms applied to which jobs, and
4 during which time periods. FedEx is ordered to supplement the interrogatory response to provide this
5 information.

2. Plaintiffs' Twenty-First Set of Requests for Production (Docket Nos. 466, 486)

8 Plaintiffs move to compel production of the personnel files, job applications, PRISM histories,
9 computer readable data showing employment histories, and organizational charts showing the job titles
10 and reporting structure for Michael John Snyder (a former FedEx manager who was deposed in this
11 case), and Theodore L. Weise, Michael Pigors, David F. Rebholz, and Timothy George Wertner, four
12 FedEx executives. Plaintiffs have submitted, *inter alia*, excerpts from the deposition testimony of Mr.
13 Snyder regarding comments allegedly made by the other four executives, as well as statements by one
14 executive regarding FedEx's corporate culture.

15 Plaintiffs assert that they need the documents at issue to learn “(1) the time periods during which
16 the executives worked in the Western region; (2) the executives’ policy-making powers and likely
17 influence over those who worked below them; (3) any direct adverse action towards class members
18 taken by these executives; (4) any evidence of racial slurs made by these executives during the class
19 period; (5) whether anyone else ever complained that the executives exhibited racial animus towards
20 class members (perhaps within the class period); and (6) whether FedEx ever took any actions to halt
21 discriminatory acts by these executives.” Docket No. 466. Plaintiffs state, and defendant does not
22 dispute, that each of the executives held high-ranking positions within the Western region or the
23 company as a whole during the class period. Plaintiffs seek Snyder’s employment records in
24 anticipation of the fact that FedEx will attempt to impeach Snyder as a disgruntled employee.

25 Defendant objects to the production of these documents on two primary grounds. First,

³ Although the Court has received a copy of FedEx's September 14, 2006 opposition letter brief, that brief does not appear on the docket. If FedEx has not filed a copy of this letter brief, FedEx should do so. Plaintiff's opening and reply letter briefs were filed under seal.

1 defendant asserts that the Court should not consider the Snyder deposition transcript because Mr. Snyder
2 refused to take an oath at the beginning of that deposition. However, as plaintiffs note, much if not all
3 of the information contained in the more recent deposition transcript was also discussed in Snyder's
4 earlier deposition, portions of which have been submitted to the Court in connection with other matters.
5 To the extent defendant seeks a ruling that Snyder's deposition testimony is inadmissible, the Court
6 finds it unnecessary to resolve that question at this time.

7 Defendant also asserts that even if the Court considers the Snyder deposition testimony, at most
8 he has testified about "stray remarks" that have no relevance to the instant case. The Court disagrees.
9 In the context of a class action challenging various employment policies and practices as discriminatory,
10 it is relevant whether high ranking executives hold, and act upon, discriminatory beliefs. *See Emmel*
11 *v. Coca Cola Bottling Co.*, 95 F.3d 627, 637 (7th Cir. 1996) (finding "ample evidence" to support
12 punitive damages claim where upper management made statements indicating resistance to women
13 holding management roles, and where evidence showed company acted on those attitudes). Whether
14 any such information is admissible is a different question that will be addressed, if necessary, in
15 connection with motions for summary judgment or at trial. Accordingly, the Court concludes that
16 plaintiffs are entitled to the documents sought in the twenty-first set of requests for production.⁴

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18 **3. Plaintiffs' Twenty-Seventh Set of Requests for Production (Docket Nos. 448 & 478)**

19 Plaintiffs move to compel the production of certain validation studies, or in the alternative, to
20 confirm that no such studies exist. FedEx's September 18, 2006 letter brief states that in response to
21 plaintiff's motion, "[a]ll validation studies related to the BST and ASPIRE have been produced," and
22 that although there are no validity studies pertaining to performance reviews, "documents demonstrating
23 that the performance reviews are content valid and related to the various positions were produced."
24 Docket No. 478.

25 FedEx states that only one study was not produced: the validation study for the Customer

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27 ⁴ Defendant states that FedEx does not maintain old organizational charts. Defendant is only
28 ordered to produce those organizational charts that are responsive to the document request and which
currently exist.

1 Representative biodata instrument. FedEx states that this document was not produced because it was
2 developed for use with customer representatives, who are no longer part of FedEx and are employees
3 of a different company, FedEx Services. The Court agrees with defendant that this validation study does
4 not appear to be relevant to any of the claims in this case, and accordingly denies the motion to compel.
5 If plaintiffs contend that this validation study is relevant to the issues in this case, plaintiffs may renew
6 their motion in a separate letter brief.

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8 **4. Plaintiff Rick Gonzales' Second Set of Interrogatories (Docket Nos. 449, 453, 479 & 488)**

9 Plaintiff Rick Gonzales' second set of interrogatories requests that FedEx provide the following
10 information:

- 11 1. Please identify any and all non-African American or non-Latino employees in
12 the Southern California District of FedEx's Western Region, who were displaced
13 from their positions due to disability or medical absence/leave in accordance
with Policy 1-6, but were provided an offer of accommodation by Defendant
within 75 miles of his/her place of residence.
- 14 2. Please identify any and all non-African American or non-Latino employees in
15 the Southern California District of FedEx's Western Region, who were displaced
16 from their positions due to disability or medical absence/leave in accordance
with Policy 1-6, but were provided an offer of accommodation by Defendant
within 75 miles of his/her last place of work.

17 Davis Decl., Ex. C. The time period covered by the interrogatories is April 1, 1997 to the present. *Id.*

18 FedEx objected to these interrogatories on the ground that it previously made this information
19 available in connection with a document production in April 2004 and September 2005. That previous
20 document production, which was itself the subject of several motions to compel and resulted in several
21 orders from this Court, concerned plaintiff's request for production of "documents relating to non-
22 African American and Latino employees return to work after disability leave." By orders filed March
23 21 and September 7, 2005, the Court ordered FedEx to produce documents as kept in the ordinary
24 course of business, supplemented with specific information to enable plaintiffs to locate the information
25 at issue. *See* Docket No. 348 at 5.⁵

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27 ⁵ For example, the Court ordered defendant to "identify the names of employees who qualify
28 under the definition of long-term disability leave and provide plaintiff with a list that includes: (1) the
name of all qualifying employees, (2) the date each employee began leave, and (3) the date each

1 FedEx asserts, without any supporting declarations, that the documents previously made
2 available in response to the earlier document requests also contain the information sought by plaintiff
3 Gonzales' interrogatories. Even if that is true, however, defendant cannot fulfill its discovery
4 obligations by referring plaintiffs to voluminous records without providing guidance as to where the
5 relevant information might be found. *See Fed. R. Civ. P. 33(d); Rainbow Pioneer No. 44-18-04A v.*
6 *Hawaii-Nevada Corp.*, 711 F.2d 902, 906 (9th Cir. 1983).

7 Accordingly, the Court orders defendant to (1) identify the names of any and all employees in
8 the Southern California District of FedEx's Western Region, who were displaced from their positions
9 due to disability or medical absence/leave in accordance with Policy 1-6; (2) supplement, if necessary,
10 the lists previously ordered in the September 7, 2005 order with respect to employee names and
11 numbers, so that plaintiffs can compare that list with previously provided information regarding
12 employees' races; and (3) make all relevant files available to plaintiffs. If those files do not contain
13 information regarding the geographic scope of any accommodation offered, as defendant's letter brief
14 recognizes is a possibility, defendant shall at that time conduct whatever further search is necessary in
15 order to provide interrogatory responses with the relevant information.

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17 **5. Plaintiffs' Interrogatories Nos. 1 and 2, Second Set (Docket Nos. 458, 480 & 482)**

18 The parties' dispute centers on information defendant has provided concerning JCATS and,
19 relatedly, job postings. Plaintiffs assert that there are numerous promotions that do not appear in the
20 JCATS database. In order to understand how a promotion can be found in PRISM job history data but
21 not in the JCATS data, plaintiffs propounded two interrogatories:

- 22 1. Do documents exist, or did documents exist, relating to postings for permanent
23 part-time or permanent full-time hourly positions that were not posted in
 JCATS?
- 24 2. If the answer to Interrogatory No. 1 is "yes," please indicate:
25 a. Do the documents still exist?
 b. If they do not still exist, when did they stop existing?
 c. How and by whom were the documents created?
 d. How and by whom were the documents destroyed?

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28 employee returned to work; after plaintiffs have determined which employees on this list are relevant
to the litigation, defendant must make all relevant files available to plaintiff." *Id.*

1 Docket No. 458 at Ex. D. Defendant responded: “A reasonable search for ‘permanent part-time or
2 permanent full-time hourly positions that were not posted in JCATS’ was conducted and no documents
3 were located.” *Id.* at Ex. E.

4 Plaintiffs assert that defendant’s response is insufficient because Interrogatory No. 1 calls for
5 a “yes” or “no” answer. The Court agrees with plaintiffs on this point. Although defendant contends
6 that a “yes” or “no” answer is not required because the question is not a request for admission but an
7 interrogatory, defendant’s answer is incomplete because it does not answer whether any such documents
8 have ever existed. Defendant is ordered to supplement its interrogatory response to clarify whether any
9 such documents have ever existed; if such documents did exist, defendant would also be required to
10 answer Interrogatory No. 2.

11 Plaintiffs also assert that defendant’s response is insufficient because defendant interpreted
12 Interrogatory No. 1 to pertain only to job postings that had never been posted in JCATS, while plaintiffs
13 intended the interrogatory to include “postings that were posted [in JCATS] and filled outside of
14 JCATS.” Docket No. 458 at 4. Plaintiffs assert that if there were in fact postings that were posted in
15 JCATS, they should have received such information in the JCATS data. However, whether defendant’s
16 document production was inadequate is a separate issue (not presented in the instant motion to compel)
17 from whether Interrogatory No. 1 calls for the information that plaintiffs intended.

18 The Court agrees with defendant that, as framed, the interrogatory only asked whether
19 documents exist, or previously existed, “relating to postings . . . that were not posted in JCATS.” The
20 plain language of plaintiffs’ interrogatory covers postings “not posted in JCATS.” Plaintiffs did not ask
21 about the existence of documents relating to postings “that were posted in JCATS and filled outside the
22 JCATS process.” Accordingly, to the extent plaintiffs seek to compel a further response regarding
23 postings originally posted in JCATS and filled outside the JCATS process, the Court denies the motion.
24

25 **6. Plaintiffs’ Requests for Admissions Nos. 3-6 (Docket Nos. 487 & 490)**

26 Plaintiffs move to compel defendant to admit or deny the authenticity of numerous documents
27 produced by FedEx in this litigation. Plaintiffs’ Request for Admission No. 3 requests,

28 Please admit the authenticity of deposition exhibits 1 through 214, used in 30(b)(6)

1 depositions noticed in the above-captioned case. If any document is identified as not
2 authentic, state with specificity the grounds upon which the document is not what it
3 purports to be.

4 Docket No. 487, Ex. A. Requests four through six are similar. *See id.* (RFA 4 asking defendant to
5 admit or deny that same exhibits are “kept in the ordinary course of business” and are “fair and accurate
6 copies of the originals”; RFA 5 asking defendant to admit or deny authenticity of “all paper personnel
7 files produced by defendant”; RFA 6 asking defendant to admit or deny that paper personnel files “kept
8 in the ordinary course of business” and are “fair and accurate copies of the originals”). Plaintiffs did
9 not attach copies of any documents to these requests for admission. Defendant objected to the requests
10 on numerous grounds, and also incorporated its response to Request No. 1, which, *inter alia*, admitted
that certain documents were authentic and kept in the regular course of business activity.

11 The Court concludes that there was nothing improper about defendant’s responses. It is not
12 reasonable to ask a party to admit the authenticity of hundreds of documents that are not attached to the
13 request. By requesting defendant to make admissions regarding hundreds of deposition exhibits, or
14 “paper personnel files,” plaintiffs inappropriately put the burden on defendant to sift through the
15 voluminous discovery in this case. To the extent that issues remain regarding authenticity or business
16 record foundation, those questions can be addressed at trial.

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18 **7. Plaintiffs’ motion to compel and for sanctions (Docket Nos. 454-456, & 481)**

19 **A. Production of documents**

20 Plaintiffs move to compel the production of documents that plaintiffs assert were twice ordered
21 produced by this Court, yet never actually produced. Plaintiffs also seek sanctions based on FedEx’s
22 alleged failure to comply with the Court’s previous orders. The documents relate to the employment
23 histories of the named plaintiffs and their comparators.

24 As background, the Court’s March 21, 2005 order directed FedEx to produce, *inter alia*,
25 “personnel files for the remaining 12 of the 33 comparators, and complete files for all comparators,
26 including performance reviews” and “ASPIRE files for comparators.” Docket No. 311 at 5. Following
27 FedEx’s production of documents in response to the March 21, 2005 order, the parties sought resolution
28 of a dispute concerning whether FedEx had complied with that order. In connection with that dispute,

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1 FedEx asserted that it had fully complied with the Court's March 21, 2005 order, and that it had
2 produced all available files in FedEx's possession. The Court's September 7, 2005 order provided, in
3 relevant part,

4 The Court agrees with plaintiffs that the electronic versions of personnel files are not
5 sufficient to allow comparisons of job applicants, and that it appears that FedEx did
6 maintain paper personnel records, with ASPIRE materials, at least in some cases. . . .
7 Therefore, defendant's current production is either incomplete, if those documents
8 indeed exist for other comparators, or complete, if those documents once existed but are
9 no longer in FedEx's possession. The Court hereby ORDERS that defendant either
10 produce the following documents or provide a sworn statement regarding the reasons
11 these documents are unavailable: (1) complete performance reviews for plaintiffs and
12 the comparators; (2) complete ASPIRE management training materials for plaintiffs and
13 the comparators; (3) complete ASPIRE job packets for plaintiffs and the comparators
14 for lower management positions; (4) descriptive postings of the positions for which
15 plaintiffs applied; and (5) interview notes of panelists for the jobs at issue. To the extent
16 that this production does not include responsive documents because they no longer exist
17 in either paper or electronic format, defendant's declaration must state when it destroyed
18 or ceased to retain these documents, and the policies or reasons for their destruction.
19 Defendant must submit this declaration to the Court **on or before September 23, 2005.**

20 Docket No. 349 at 2-3. Defendant did not submit a declaration in response to the September 7, 2005
21 order.

22 Plaintiffs have submitted the declaration of plaintiffs' counsel Hank Willson, which describes
23 FedEx's document production in response to the Court's September 7, 2005 order. According to the
24 Willson declaration, FedEx produced two identical CDs on October 28, 2005, and then more documents
25 on November 7, 2005. Willson Decl. ¶¶ 4-6. Based upon their review of FedEx's various document
26 productions, plaintiffs assert that FedEx has failed to produce the following documents:

- 27 • The descriptive posting documents describing the actual positions for which the
28 named plaintiffs applied; plaintiffs state that FedEx has only produced the
descriptive postings regarding, according to FedEx, "Career Opportunities . . .
relevant to plaintiff Stevenson."
- The paper personnel files for the 61 comparators identified by FedEx; plaintiffs
state FedEx has only produced electronic performance evaluations.
- All interview notes for the management positions for which the named plaintiffs
applied; plaintiffs state FedEx has only produced interview notes for some of the
positions for which, it claims, plaintiff Stevenson applied.
- Legible discipline records for the comparators to the named plaintiffs; plaintiffs
state FedEx has produced such records but in an illegible format, and has failed

1 to rectify the problem despite requests that it do so.⁶

- 2 • ASPIRE packets and documents regarding the named plaintiffs who applied for
3 management positions; plaintiffs state FedEx has only produced ASPIRE packets
4 and documents that it claims relate to plaintiff Stevenson, but not for plaintiffs
Boykin or Brown.

5 Docket No. 454 at 2. In addition, plaintiffs contend that with respect to the documents that FedEx did
6 produce pertaining to comparators, it failed to identify the particular plaintiff to whom the comparator
7 applies, and has refused to provide any information on this point despite being requested to do so.
8 Defendant responds that it has fully complied with the Court's previous discovery orders, and raises
9 specific arguments, discussed below, with respect to the five categories of documents.

10 After careful review of the parties' letter briefs, declarations, and exhibits, the Court concludes
11 that defendant has not complied with its discovery obligations, and that this failure is particularly glaring
12 in light of the two previous orders compelling production of the documents at issue. The Court is
13 mindful of the fact that discovery in this class action has been complicated and extensive. However,
14 defendant has repeatedly been ordered by this Court to either produce the documents at issue or provide
15 a sworn declaration explaining any gaps in the production; despite numerous opportunities to do so,
16 including the meet and confer prior to the filing of plaintiffs' motion, defendant has failed to either
17 produce the documents or provide an explanation as to why certain documents are not produced.

18 For two of the categories at issue – job postings and interview notes – defendant argues that to
19 the extent it did not actually produce some documents, it made those documents available to plaintiffs
20 under Rule 34(b), and that plaintiffs chose not to inspect the business records. For example, although
21 defendant produced job postings for plaintiff Stevenson, with respect to the other named plaintiffs, Mr.
22 Douglas' October 28, 2005 letter generally referred plaintiffs to a building in Memphis, Tennessee for
23 postings between June 2002 and November 4, 2005, and to an "offsite warehouse" for postings prior
24 to June 2002. *See* Docket No. 456, Ex. C. Similarly, although defendant produced some interview notes
25 with respect to some named plaintiffs, defendant referred plaintiffs in that same letter to the OAK, JDY,
26 SJC and BFL sites to "review any personnel file."

27 ⁶ The parties are ordered to meet and confer on this issue, and if in fact the documents are
28 illegible, defendant shall produce legible copies to plaintiffs; making such documents available at
various sites and warehouses will not be sufficient.

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1 The Court finds these arguments lack merit. The Court's September 7, 2005 order directed
2 defendant to produce these specific documents, and defendant has provided no explanation why it can
3 produce certain job postings and interview notes to plaintiffs, but not others. Particularly in the context
4 of a court order directing defendant to produce these documents, the Court finds that referring plaintiffs
5 to locations scattered around the country to look for documents does not fulfill defendant's obligations.

6 With respect to plaintiffs' contention that FedEx did not produce paper personnel files for the
7 "comparators identified by FedEx,"⁷ defendant confusingly asserts that "it is plaintiffs' obligation to
8 identify comparators." Docket No. 481 at 3. FedEx's chart, which is found at Docket No. 481,
9 Attachment 3, states that it has produced various documents and "personnel files" for particular
10 individuals, and "paper personnel files" for fourteen individuals. *See id.* The Court assumes that by
11 distinguishing between "personnel files" and "paper personnel files," defendant implicitly concedes that
12 it has not, in fact, produced paper personnel files for all of the comparators at issue. The Court's
13 September 7, 2005 order held that paper personnel files were required in addition to electronic files to
14 enable plaintiffs to make a complete comparison between the named plaintiffs and their comparators.
15 Thus, to the extent that FedEx only produced electronic files for comparators, FedEx was obligated,
16 under the terms of the September 7, 2005 order, to also produce paper files for those individuals. If
17 paper files do not exist for those individuals, FedEx was required to explain why. FedEx has not done
18 so.

19 With respect to identification of comparators, plaintiffs' motion to compel concerns comparators
20 *identified by FedEx.* Plaintiffs have submitted a list, attached as Exhibit A to the Willson reply
21 declaration (Docket No. 495), listing all of the comparators identified by FedEx in its October 28, 2005
22 and November 7, 2005 productions. If FedEx identified an individual as a comparator, it logically
23 makes sense that FedEx should identify the plaintiffs with whom the "comparators" correspond.

24
25 Finally, with regard to ASPIRE packets and documents for named plaintiffs Boykin and Brown,
26 defendant asserts that "earlier this year" it produced the ASPIRE materials for Boykin, and that there
27

28 ⁷ The Court notes that plaintiffs' motion states that there are 61 comparators at issue, while
plaintiffs' reply states that there are 78 comparators.

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1 are no materials for Brown. *See* September 14, 2006 declaration of Shelia Mattison. *See* Docket No.
2 481 at Attachment 2. Plaintiffs' reply contends that there should be a JCA and ASPIRE management
3 application packet for Ms. Boykin in connection with her application for an Operations Manager
4 position. Plaintiffs also assert that there should be ASPIRE materials for Ms. Brown because she
5 testified at her deposition that she completed ASPIRE training, and also because applied for two
6 management positions in 2001. If plaintiffs are correct, plaintiffs are entitled to these materials; if these
7 materials do not exist, defendant must provide an explanation.

8 Accordingly, the Court GRANTS plaintiffs' motion to compel and GRANTS plaintiffs' motion
9 for sanctions, as follows:

- 10 • defendant shall produce descriptive postings of the positions for which *all* of the
11 named plaintiffs applied;
- 12 • defendant shall produce paper personnel files for all of the comparators identified
13 by FedEx as listed in Attachment A to the reply Willson Declaration;
- 14 • for those comparators identified by FedEx, defendant shall identify the named
15 plaintiffs with whom the comparators correspond;
- 16 • defendant shall produce all interview notes for the management positions for
17 which *all* of the named plaintiffs applied;
- 18 • if there are no additional ASPIRE materials for plaintiffs Boykin and Brown,
19 defendant shall file a sworn declaration describing all steps taken to locate the
20 specific items described in plaintiffs' October 4, 2006 letter brief;
- 21 • to the extent defendant contends that it has already produced any of the
22 documents described above, defendant shall provide a sworn declaration
23 identifying the Bates numbers that correspond to the type of document;
- 24 • to the extent that defendant's production does not include responsive documents
25 because they no longer exist in either paper or electronic format, defendant must
26 file a sworn declaration stating when it destroyed or ceased to retain these
27 documents, and the policies or reasons for their destruction; and
- 28 • defendant shall pay for plaintiffs' reasonable attorneys' fees and costs associated

1 with the instant motion to compel (not fees associated with plaintiffs' other
2 motions to compel addressed in this order).

3 The parties shall meet and confer regarding plaintiffs' fees and costs; if the parties are unable to agree
4 as to the reasonableness of the fees and costs sought, the parties shall submit letter briefs with
5 supporting declarations to the Court.

6

7 **B. Rule 30(b)(6) depositions**

8 The parties dispute whether three Rule 30(b)(6) deponents were knowledgeable about the
9 subjects on which they were designated. Plaintiffs requested the designation of a person to testify
10 regarding,

11 The steps taken to train managers how to evaluate each aspect of employee performance
12 measured by each of the performance evaluations used to evaluate the performance of
13 employees in each class member job code during the class period . . . including
14 monitoring of such training.

15 Wallace Decl. Ex. E at 3. FedEx raised various objections to the notice, and responded with twelve
16 different designations according to specific subjects, such as “teamwork” and “planning and
17 organizing.”

18 **Michael Martorano:** FedEx produced Mr. Martorano, Training Advisor, on the subject of
19 “designing of training material.” *Id.* During his deposition, Mr. Martorano testified that he did not have
20 any knowledge regarding designing the substance of training materials; instead, he testified that he was
21 as a “middle man” responsible for “getting that information from the people who create the policies and
22 putting it our training manual verbatim.” Martorano Depo. at 26. Plaintiffs’ counsel asked, “So your
23 job is not to decide what content goes into these manuals?” to which Mr. Martorano responded, “That
24 is correct.” *Id.* at 27.

25 The Court agrees with plaintiffs that Mr. Martorano was not a knowledgeable Rule 30(b)(6)
26 deponent. FedEx’s arguments to the contrary, it strains credulity to state that a deponent who can only
27 testify as to the mechanical process for creating training materials fulfills the obligation to produce a
28 someone knowledgeable about “designing of training material.” Defendant’s arguments might be
persuasive if the technical processes of designing training materials were somehow relevant to plaintiffs’

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1 claims. They are not. Accordingly, defendant is ordered to produce in San Francisco⁸ another designee
2 who is knowledgeable about designing the *substance* of training materials.

3 **Philip Douglas:** In response to the same notice, FedEx produced Mr. Douglas, Senior
4 Management Facilitator, on the subject of “Leadership Principles I.” Neither party has provided the
5 Court with a definition or explanation of “Leadership Principles I.” Plaintiffs assert that Mr. Douglas
6 was an inadequate designee because he was not knowledgeable about how managers were trained to do
7 performance reviews as part of that training, and because Mr. Douglas testified that he did not know
8 anything about the text of a Leadership training manual. However, the deposition excerpts provided by
9 plaintiffs do not support plaintiffs’ assertions. Based upon the record before the Court, the Court does
10 not find that Mr. Douglas was an inadequate designee, and accordingly this aspect of plaintiff’s motion
11 is denied.

12 **John Skinner:** FedEx produced Mr. Skinner on the topic of “Checksits,” which again neither
13 party defines or explains. Plaintiffs assert that Mr. Skinner was an inadequate designee because he was
14 only knowledgeable about this topic for FedEx’s DGO division, and not its AGFS division. Defendant
15 responds that plaintiffs’ Rule 30(b)(6) notice did not indicate that they considered any distinction
16 between DGO and AGFS to be significant. The Court finds this argument lacks merit, as the deposition
17 notice used general terms which would presume to encompass both of FedEx’s divisions. Defendant
18 also contends that plaintiffs’ argument is nothing but “smoke and mirrors” since plaintiffs’ counsel made
19 no inquiry as to whether there are practical and relevant differences between the two divisions with
20 respect to Checksits. However, as a review of the deposition transcript makes clear, Mr. Skinner and
21 his counsel repeatedly informed plaintiffs’ counsel that Mr. Skinner’s knowledge was limited to DGO
22 and that he was not familiar with the Checksit procedures for AGFS. *See* Skinner Depo. at 196-97.
23 Thus, any such inquiry would appear to have been pointless. Accordingly, defendant is ordered to
24 produce in San Francisco a Rule 30(b)(6) designee who is knowledgeable about Checksit procedures
25 for AGFS.

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⁸ Plaintiffs’ counsel traveled to Memphis, Tennessee for the Rule 30(b)(6) depositions. In light
28 of defendant’s failure to produce knowledgeable deponents, the Court finds it reasonable to require the
additional Rule 30(b)(6) depositions to take place in San Francisco.

1 Plaintiffs further argue that Mr. Skinner was inadequate because he testified his job was merely
2 to design the form used by managers when conducting Checksits, and he had no knowledge about how
3 managers actually used these forms when performing Checksits of actual employees. As an initial
4 matter, the Court finds that these questions appear to be beyond the scope of the information plaintiffs
5 requested. *See* Wallace Decl. Ex. E at 5 (requesting designation of person to testify regarding “steps
6 taken to design each of the performance evaluations . . .”). Moreover, as defendants note, in the meet
7 and confer prior to the depositions, the parties agreed that the depositions would not cover information
8 about local decisions, operations or practices. The Court finds that in this respect, Mr. Skinner was not
9 an inadequate designee.

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C. Additional depositions

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Plaintiffs seek to take the depositions of two fact witnesses regarding the discipline claims of two of the named plaintiffs. Plaintiffs have submitted the declaration of Hank Willson, Esq., describing plaintiffs’ attempts to depose these individuals prior to the close of fact discovery. The Court concludes that, although plaintiffs delayed somewhat with respect to the Likong deposition, plaintiffs did make a number of efforts to take his deposition prior to the close of discovery, and thus plaintiffs are granted leave to take his deposition. However, plaintiffs have not demonstrated good cause to take the deposition of Greg Koontz, and accordingly the Court denies the request to take that deposition.

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CONCLUSION

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For the foregoing reasons, the Court hereby GRANTS in part and DENIES in part plaintiffs’ motions to compel, and GRANTS plaintiffs’ motion for sanctions. Defendant shall supplement its interrogatory responses and document production, and file any required declarations, by **October 18, 2006**. The parties shall meet and confer regarding the scheduling of the Rule 30(b)(6) depositions and the deposition of Mr. Likong. The parties shall meet and confer regarding the amount of attorneys’ fees and costs awarded to plaintiffs as a sanction; if the parties are unable to agree on that amount, plaintiffs shall file a letter brief and supporting declaration by **October 18, 2006**, and defendant may file a response by **October 25, 2006**.

1 **IT IS SO ORDERED.**
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3 Dated: October 6, 2006
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Susan Illston
SUSAN ILLSTON
United States District Judge